

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

ORIGINAL

Civil Action No. 00-K-212

ECHOSTAR COMMUNICATIONS CORPORATION,
a Nevada corporation; ECHOSTAR SATELLITE
CORPORATION, a Colorado corporation; and ECHOSTAR
TECHNOLOGIES CORPORATION, a Texas corporation,

Plaintiffs,

v.

DIRECTV ENTERPRISES, Inc., a Delaware corporation;
DIRECTV, Inc., a California corporation;
DIRECTV MERCHANDISING, Inc., a Delaware corporation;
DIRECTV OPERATIONS, Inc., a California corporation;
HUGHES NETWORK SYSTEMS, a Delaware corporation; and
THOMSON CONSUMER ELECTRONICS, Inc.,
d/b/a RCA, a Delaware corporation,

Defendants.

AND RELATED COUNTERCLAIMS

EXCERPTS OF FACTUAL AUTHORITIES
IN SUPPORT OF
DIRECTV DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON
ECHOSTAR'S ANTITRUST CLAIMS
(COUNTS 1, 2, 3, 4, 5, 6, 7 and 10, 11, 12 AND 13)

FILED
UNITED STATES DISTRICT COURT
DENVER, COLO.

OCT 06 2000

JAMES R. MANSPEAKER
CLERK

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FOR PUBLIC INSPECTION

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APPENDIX OF FULL FACTUAL AUTHORITIES

- A. Comments of EchoStar Satellite Corporation, *In re Implementation of the Satellite Home Viewer Improvement Act of 1999*, FCC CS Docket No. 99-363 (February 1, 2000), available on the FCC web site
<https://haifoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6010953141>.
- B. Declaration of Michael Schwimmer (November 24, 1997), *attached to* EchoStar Communications Corporation, Program Access Complaint, FCC File No. CSR-5165-P (November 24, 1997).
- C. Comments of EchoStar Communications Corporation, *In re Policies and Rules for the Direct Broadcast Satellite Service*, FCC IB Docket No. 98-21 (April 6, 1998), available on the FCC web site
<https://haifoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=2034510001>.
- D. Reply Comments of EchoStar Satellite Corporation, *In re Implementation of the Satellite Home Viewer Improvement Act of 1999*, FCC CS Docket No. 99-363 (January 21, 2000), available on the FCC web site
<https://haifoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6010952522>.
- E. Federal Communications Commission Office of Plans and Policy, Working Paper No. 26: *Broadcast Television in a Multichannel Marketplace*, 6 FCC Rcd. 3996 (rel. June 27, 1991), available on Westlaw (1991 WL 640551).
- F. Federal Communications Commission, Report and Order, *In re Amendment of Parts 73 and 76 of the Commission's Rules*, FCC GEN. Docket No. 87-24, 3 FCC Rcd. 5299 (rel. July 15, 1988), available on Westlaw (1998 WL 486817) and Lexis (1988 FCC LEXIS 1329).

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- G. Charles W. Ergen, Testimony Before the Subcommittee on Antitrust, Business Rights, and Competition, Committee on the Judiciary, U.S. Senate (January 27, 1999), available on Westlaw (1999 WL 32965).
- H. Charles W. Ergen, Testimony Before the Commerce Committee, U.S. Senate (July 28, 1998), available on Westlaw (1998 WL 526888).
- I. Charles W. Ergen, Testimony Before the Subcommittee on Telecommunications, Trade and Consumer Protection, Committee on Commerce, U.S. House of Representatives (April 1, 1998), available on Westlaw (1998 WL 798847).
- J. Charles W. Ergen, Testimony Before the Subcommittee on Courts and Intellectual Property, Committee on the Judiciary, U.S. House of Representatives (February 4, 1998), available on Westlaw (1998 WL 61501).
- K. Charles W. Ergen, Testimony Before the Subcommittee on Telecommunications, Trade and Consumer Protection, Committee on Commerce, U.S. House of Representatives (October 30, 1997), available on Westlaw (1997 WL 683674).
- L. Comments of EchoStar Satellite Corporation, *In re Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, FCC CS Docket No. 99-230 (August 6, 1999), available on the FCC web site
<https://haifoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6009148730>.
- M. Comments of EchoStar Communications Corporation, *In re Amendment of Parts 2 and 25 of the Commission's Rules*, FCC ET Docket No. 98-206 (March 2, 1999), available on the FCC web site
<https://haifoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6006443772>.
- N. Federal Communications Commission, Sixth Annual Report, *In re Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, FCC

CS Docket No. 99-230, 15 FCC Rcd. 978 (rel. January 14, 2000), available on Westlaw (2000 WL 347568) and Lexis (2000 FCC LEXIS 250).

- O. DISH Network, *Programming Overview*, available on DISH Network's web site
<http://www.dishnetwork.com/software/third_level_content/overview/index.asp>.
- P. DISH Network, *Basic Package Channel List*, available on DISH Network's web site
<[http://www.dishnetwork.com/software/third_level_content/top_100/index.asp?package_name=America""s%2BTop%2B100%2BCD&view=list](http://www.dishnetwork.com/software/third_level_content/top_100/index.asp?package_name=America)>.
- Q. DISH Network Advertisement, USA TODAY, March 16, 2000, at 14A.
- R. EchoStar Communications Corporation, Form 10-K for the year ended December 31, 1999, available on the SEC web site
<<http://www.sec.gov/Archives/edgar/data/1001082/0001035704-00-000160.txt>>.
- S. EchoStar advertisement, produced by EchoStar [ECC0006563].
- T. Web page from AT&T's Internet site, <<http://www.cable.att.com/cgi-bin/index.fcgi>>. This page is accessible by entering a ZIP code for an area serviced by AT&T digital cable (such as 80210).
- U. Comments of EchoStar Communications Corporation, *In re Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, FCC CS Docket No. 97-141 (July 23, 1997), available on the FCC web site,
<https://haifoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1878570001> and
<https://haifoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=1878570002>.
- V. Comments of the United States Department of Justice, *In re Application of MCI Telecommunications Corporation and EchoStar 110 Corporation*, FCC File No. SAT-ASG-19981202-00093 (January 14, 1999).

- W. Federal Communications Commission, First Report, *In re Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC CS Docket No. 94-48, 9 FCC Rcd. 7442 (rel. September 28, 1994), available on Westlaw (1994 WL 528274) and Lexis (1994 FCC LEXIS 5322).
- X. Federal Communications Commission, Fifth Annual Report, *In re Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, FCC CS Docket No. 98-102, 13 FCC Rcd. 24284 (rel. December 23, 1998), available on Westlaw (1998 WL 892964) and Lexis (1998 FCC LEXIS 6502).
- Y. Federal Communications Commission, Fourth Annual Report, *In re Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, FCC CS Docket No. 97-141, 13 FCC Rcd. 1034 (rel. January 13, 1998), available on Westlaw (1998 WL 10229) and Lexis (1998 FCC LEXIS 140).
- Z. Federal Communications Commission, Third Annual Report, *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC CS Docket No. 96-496, 12 FCC Rcd. 4358 (rel. January 2, 1997), available on Westlaw (1997 WL 2451) and Lexis (1997 FCC LEXIS 151).
- AA. Federal Communications Commission, Second Annual Report, *In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC CS Docket No. 95-61, 11 FCC Rcd. 2060 (rel. December 11, 1995), available on Westlaw (1995 WL 733714) and Lexis (1995 FCC LEXIS 7901).
- BB. United States Department of Justice, Complaint, *United States v. Primestar, Inc.* (May 12, 1998), available on the U.S. Department of Justice web site <<http://www.usdoj.gov/atr/cases/f1700/1757.htm>>.

- CC. Reply Comments of the Staff of the Federal Trade Commission, *In re Satellite Carrier Compulsory License*, Copyright Office Docket No. RM 98-1 (March 1998), available on the FTC web site <<http://www.ftc.gov/os/1998/9803/dbscom.htm>>.
- DD. United States General Accounting Office, Report to the Subcommittee on Antitrust, Business Rights, and Competition, Committee on the Judiciary, U.S. Senate, *Telecommunications: The Changing Status of Competition to Cable Television*, GAO/RCED-99-158 (July 1999).
- EE. Joint Explanatory Statement of the Committee of Conference on the Intellectual Property and Communications Omnibus Reform Act of 1999, H.R. 1554, 145 Cong. Rec. H11792-811, produced by EchoStar [ECC0077221-77248]. This document is also available on Westlaw (145 Cong. Rec. H11769, 1999 WL 1015352).
- FF. Petition to Dismiss or Deny of EchoStar Communications Corporation, *In re Application of TCI Satellite Entertainment, Inc., and PRIMESTAR, Inc.*, FCC File No. 91-SAT-TC-97 (August 22, 1997).
- GG. Petition of EchoStar Communications Corporation to Dismiss or Deny, *In re Application of MCI Telecommunications Corp. and PRIMESTAR LHC, Inc.*, FCC File No. 106-SAT-AL-97 (September 25, 1997).
- HH. Federal Communications Commission, Order on Reconsideration, *EchoStar Communications Corp. v. Fox/Liberty Networks LLC*, FCC File No. CSR-5138-P, 14 FCC Rcd. 10480 (rel. June 30, 1999), available on Westlaw (1999 WL 436222) and Lexis (1999 FCC LEXIS 2992).
- II. Federal Communications Commission, Memorandum Opinion and Order, *EchoStar Communications Corp. v. Comcast Corp.*, FCC File No. CSR-5244-P, 14 FCC Rcd. 2089 (rel. January 26, 1999), available on Westlaw (1999 WL 27028) and Lexis (1999 FCC LEXIS 307).

- JJ. Federal Communications Commission, Memorandum Opinion and Order, *EchoStar Communications Corp. v. Speedvision Network, LLC*, FCC File No. CSR-5364-P, 14 FCC Rcd. 9327 (rel. June 14, 1999), available on Westlaw (1999 WL 381800) and Lexis (1999 FCC LEXIS 2698).
- KK. PrimeTime 24 Joint Venture, Complaint, *PrimeTime 24 Joint Venture v. EchoStar Communications Corp.*, 98 Civ. 6738 (S.D.N.Y. September 23, 1998), produced by EchoStar [ECC0072761-72907].
- LL. EchoStar Communications Corporation et al., Defendants' Original Answer, Affirmative Defenses and Counterclaims, *PrimeTime 24 Joint Venture v. EchoStar Communications Corp.*, 98 Civ. 6738 (S.D.N.Y. February 22, 1999), produced by EchoStar [ECC0073093-73163].
- MM. Federal Communications Commission, Order and Authorization, *In re Application of MCI Telecommunications Corp. and EchoStar 110 Corp.*, FCC File No. SAT-ASG-19981202-0093 (rel. May 19, 1999), available on Westlaw (1999 WL 313932) and Lexis (1999 FCC LEXIS 3698).
- NN. EchoStar 110 Corp. and MCI Telecommunications Corp., Application for Consent to Assignment of Authorizations and Request for Expedited Consideration, *In re Application of MCI Telecommunications Corp. and EchoStar 110 Corp.* (December 2, 1998).
- OO. Federal Communications Commission, Memorandum Opinion and Order, *EchoStar Communications Corp. v. Fox/Liberty Networks, LLC*, FCC File No. CSR-5165-P, 13 FCC Rcd. 7394 (rel. April 17, 1998), available on Westlaw (1998 WL 177559) and Lexis (1998 FCC LEXIS 1844).
- PP. Reply of EchoStar Communications Corporation, *In re Application of MCI Telecommunications Corp. and PRIMESTAR LHC, Inc.*, FCC File No. 106-SAT-AL-97 (October 20, 1997).

QQ. Comments of EchoStar Satellite Corporation, *In re Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, FCC CS Docket No. 00-132 (September 8, 2000), available on the FCC web site
<https://haifoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6511658008>.

RR. EchoStar advertisement,
<<http://retailer.echostar.com/marketing/ads/previews/DumpCable.jpg>>.

Exhibit A

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EXHIBIT A

Comments of EchoStar Satellite Corporation, *In re Implementation of the Satellite Home Viewer Improvement Act of 1999*, FCC CS Docket No. 99-363 (February 1, 2000), available on the FCC web site

<https://haifoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6010953141>.

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Exhibit A

Page 1

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION

In the Matter of

Implementation of the Satellite Home
Viewer Improvement Act of 1999;
Retransmission Consent Issues

CS Docket No. 99-363

To: The Commission

COMMENTS OF ECHOSTAR SATELLITE CORPORATION TO SECTION III

EchoStar Satellite Corporation ("EchoStar") hereby submits its comments to Section III of the above captioned Notice of Proposed Rule Making ("NPRM").¹ Section III of the NPRM concerns the provision of the Satellite Home Viewer Improvement Act of 1999 ("SHVLA")² instructing the Commission to implement rules and procedures governing broadcasters' election of must-carry or retransmission-consent status for satellite carriage. In offering these comments, EchoStar emphasizes that it fully reserves its view that, in contrast with

¹ *In the Matter of Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues*, CS Docket No. 99-363, Notice of Proposed Rule Making, FCC 99-406 (rel. Dec. 22, 1999) ("NPRM").

² Act of Nov. 29, 1999, Pub. L. No. 106-113, § 1000(9), 113 Stat. 1501 (enacting S. 1948, including SHVLA, Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999 ("IPACORA")) (codified in scattered sections of 17 and 47 U.S.C.).

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Exhibit A

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cable must-carry, the statutory satellite must-carry requirement is an unwarranted and excessive restriction on the satellite carriers' First Amendment rights.

Indeed, in promulgating satellite election rules, the Commission should take into account the same fundamental differences between satellite and cable must-carry that make satellite must-carry constitutionally indefensible: broadcast stations do not need to be protected from the market power of satellite carriers for the simple reason that satellite carriers do not have market power; and must-carry is more onerous for satellite carriers because carrying one local station in one local market requires the devotion of nationwide capacity. These differences suggest the need for a separate body of election rules customized to satellite must-carry and to the particular burdens confronted by satellite carriers seeking to comply with the statutory requirement.

Unlike cable must-carry, the SHVIA's requirement is triggered by the *request* of the broadcast station seeking carriage. This latter provision suggests a requirement of an affirmative request, meaning that the Commission should not apply here the cable rules' presumption of must-carry election where the broadcaster fails to act. EchoStar recognizes that the Commission enacted this provision to protect cable operators in case a television station were to try to hold out and withhold consent having failed to exercise its election rights. No less protection should be available to satellite carriers. At the same time, the default must-carry election rule might create an untenable situation for a satellite carrier in light of the burdens caused by satellite must-carry. To alleviate that risk the Commission should rule that, where a broadcaster has failed to make a timely carriage request at the election time, the satellite carrier should be entitled to ascribe to the broadcaster whichever election would best facilitate the

Exhibit B

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EXHIBIT B

Declaration of Michael Schwimmer (November 24, 1997), *attached to* EchoStar Communications Corporation, Program Access Complaint, FCC File No. CSR-5165-P (November 24, 1997).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

ECHOSTAR COMMUNICATIONS
CORPORATION

Complainant

v.

FOX/LIBERTY NETWORKS, LLC

FX NETWORKS, LLC

Defendants

EXPEDITED CONSIDERATION
REQUESTED

File No. CSR - _____

Prohibited Exclusivity
Discrimination
Unfair Practices

PROGRAM ACCESS COMPLAINT

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Counsel for EchoStar Communications
Corporation

Dated: November 24, 1997

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Exhibit B

DTV 264896

CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER

FCC000000388

FOR PUBLIC INSPECTION

DECLARATION OF MICHAEL S. SCHWIMMER

My name is Michael S. Schwimmer. I hereby declare the following:

1. I am Vice President of Programming for EchoStar Communications Corporation ("EchoStar"). Since July 10, 1997, I have been responsible for EchoStar's programming and licensing, including the negotiations with program suppliers.
2. EchoStar is a provider of Direct Broadcast Satellite ("DBS") programming services in the United States. EchoStar operates two DBS satellites that allow it to provide approximately 120 channels of digital television programming to subscribers throughout the continental U.S. Accordingly, EchoStar competes against cable operators in each and every cable franchise area. EchoStar recently launched its third DBS satellite. EchoStar's address is 90 Inverness Circle East, P.O. Box 6552, Englewood, CO 80155. EchoStar's telephone number is (303) 799-8222.
3. FX Networks, LLC ("FX") distributes what it calls "the best primetime on cable," including such syndicated shows as "The X Files," "NYPD Blue," and "In Living Color," as well as regional Major League Baseball action. See FX Networks Website (visited Nov. 20-21, 1997) (http://www.fxnetworks.com/htmls/fx_splash.html), http://208.206.43.104/main_ge.html (Exhibit 13). As a multichannel video programming distributor, EchoStar competes directly for subscribers with cable operators. Accordingly, EchoStar needs to carry popular programming, such as the programming controlled by FX, in order to compete and remain competitive with cable operators.

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DTV 264923

Exhibit B

CONFIDENTIAL PURSUANT TO PROTECTIVE ORDER

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Exhibit C

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EXHIBIT C

Comments of EchoStar Communications Corporation, *In re Policies and Rules for the Direct Broadcast Satellite Service*, FCC IB Docket No. 98-21 (April 6, 1998), available on the FCC web site

<https://haifoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=2034510001>.

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Exhibit C

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FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:)
)

Policies and Rules for the)
Direct Broadcast Satellite Service)
_____)

IB Docket No. 98-21

COMMENTS OF ECHOSTAR COMMUNICATIONS CORPORATION

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Dated: April 6, 1998

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Exhibit C

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FOR PUBLIC INSPECTION

SUMMARY

EchoStar Communications Corporation ("EchoStar") hereby files these Comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned matter. EchoStar applauds the Commission's efforts to streamline Direct Broadcast Satellite ("DBS") regulations. Reducing the regulatory burdens that DBS providers face will increase the likelihood of effective competition in the multichannel video programming distribution ("MVPD") market.

EchoStar agrees with the Commission's proposal to harmonize application requirements for all satellite services, including DBS. Similarly, EchoStar supports the Commission's proposal to grant a construction permit, launch authorization and license for DBS space station facilities through one process. Consolidating these proceedings will conserve both Commission and private resources. At the same time, the Commission should be mindful of, and preserve, the nature of DBS as a lightly regulated service, and should not allow procedural simplification to import substantive changes that would interfere with that nature, such as many of the technical requirements of Part 25.

The NPRM's proposal on cable/DBS cross-ownership restrictions is similarly constructive so long as it is applied to all entities and industries evenhandedly. On the other hand, such a restriction could seriously harm the public interest if it were to be fashioned so as to exempt the entities or transactions to which they should most forcefully be applied. Thus, EchoStar supports, in principle, a cross-ownership restriction as between cable operators and DBS providers. Plainly put, such a restriction would prevent cable operators from co-opting scarce DBS spectrum resources. Such a restriction would be arbitrary, meaningless and indeed harmful if it were not applied to the current effort of PRIMESTAR to acquire the DBS permit of

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Exhibit C

FOR PUBLIC INSPECTION

of each individual case do not make sense when the relevant product market for DBS providers is the MVPD market, and not necessarily the DBS market or satellite DTH market.¹⁰ Indeed, when reviewing the competitive effects of proposed transactions, the Commission determines the relevant product market by using a methodology similar to that described in the 1992 Merger Guidelines, defining "a product market as a service or group of services for which there are no close demand substitutes."¹¹ Specifically, "the Commission must consider whether, if, in the absence of a regulation, all carriers raised the price of a particular service or group of services, customers would be able to switch to a substitute service offered at a lower price."¹²

If there was any doubt that the MVPD market was the relevant market at the time of the Commission's DBS rulemaking (when there was only one DBS provider offering a relatively different product), EchoStar has dispelled it with its product offerings. EchoStar competes in the same market as cable operators – albeit from a handicapped position. EchoStar prices its service to beat comparable cable packages and tries to make its offerings as close a substitute for a cable subscription as possible. If any other DBS provider, such as PRIMESTAR, intends to market its services as a less-than-close substitute for cable, it should not be allowed to invoke its own plan as evidence that DBS and cable distributors do not compete in the same market.

¹⁰ DBS NPRM at ¶ 60.

¹¹ In the Applications of NYNEX Corp. and Bell Atlantic Corp. for Consent to Transfer control of NYNEX Corp. and its Subsidiaries, FCC 97-286 at ¶ 50 (rel. Aug. 14, 1997) ("NYNEX/Bell Atlantic").

¹² Id.

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Exhibit D

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EXHIBIT D

Reply Comments of EchoStar Satellite Corporation, *In re Implementation of the Satellite Home Viewer Improvement Act of 1999*, FCC CS Docket No. 99-363 (January 21, 2000), available on the FCC web site:

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Implementation of the Satellite Home
Viewer Improvement Act of 1999;
Retransmission Consent Issues

CS Docket No. 99-363

JAN 21 2000

To: The Commission

REPLY COMMENTS OF ECHOSTAR SATELLITE CORPORATION

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Dated: January 21, 2000

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Exhibit D

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FOR PUBLIC INSPECTION

SUMMARY

EchoStar Satellite Corporation ("EchoStar") hereby submits its reply comments in this important proceeding to implement the bad faith and exclusive dealing prohibitions that the Commission must impose on broadcasters negotiating local-into-local retransmission consent with satellite carriers under the Satellite Home Viewer Improvement Act of 1999.¹ At the outset, EchoStar notes with grave concern that some of the comments submitted in this proceeding by the National Association of Broadcasters ("NAB") appear themselves to demonstrate a very strong inclination on the part of broadcasters to act in disregard for the good faith mandate of the statute, further reinforcing the need for the Commission to impose rules with teeth in implementation of that mandate. The NAB's defiant stance confirms, if there was any doubt, that this is not an area where the Commission can rely on any "good-Samaritan" incentive of the regulated entities to do the right thing, but rather is an area calling for decisive action to promulgate concrete rules and enforce them aggressively.

These concerns grow, among other things, out of the fact that the NAB evidently views the statutory good faith requirement as a meaningless, "largely hortatory" provision that is incapable of being implemented. Under the statute, the Commission "shall" "prohibit a television broadcast station . . . from engaging in exclusive contracts for carriage or failing to negotiate in good faith . . ."² There is nothing hortatory about this provision. When Congress

¹ Act of Nov. 29, 1999, PL 106-113, § 1000(9), 113 Stat. 1501 (enacting S. 1948, including the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"), Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999 ("IPACORA"), codified in scattered sections of 17 and 47 U.S.C.

² SHVIA, § 1002 (to be codified at 47 U.S.C. § 325(b)) (emphasis supplied).

says "prohibit," it means it – indeed, there is no more explicit way for Congress to establish a prohibition than by using the words "shall" and "prohibit." Nevertheless, the NAB argues that the statutory requirement should not be implemented because it is in its view "essentially impossible" to implement.³ This is nothing less than a call for the Commission to abdicate its statutory responsibility based on what is described by the NAB as "the extraordinary – indeed, usually insuperable – difficulty of implementing an obligation to negotiate in good faith." Again, however, when Congress imposes an obligation, it must have deemed it capable of being carried out, and it is insulting for the NAB to try to negate congressional intent on grounds of "impossibility." Moreover, if a good faith requirement is generally amorphous, this only makes more acute the need for the agency charged with implementing it to enact concrete, specific rules.

While difficulty would be an improper excuse for failing to implement the statute, the Commission's work is in fact not nearly as difficult as the broadcasters portray it: the NAB makes too little of the fact that the Commission has available to it clear statutory guidance giving specific content to the good faith requirement. Under the statute, differences in terms are not a failure of good faith only so long as they are based on competitive marketplace considerations, meaning clearly that the Commission should find such a failure where a demand for different terms is not based on such considerations. This particular good faith requirement is therefore more specifically defined by Congress here than in most agreements to negotiate in good faith,

³ See NAB Comments at 6 ("And in each such exercise, the Commission will be called on to do what courts have found to be essentially impossible: deciding when a party in a normal commercial negotiation – despite strong business reasons to want to make a deal has failed to bargain in good faith.").

by reference to the term "competitive marketplace considerations." The Commission must give concrete content to that term.

The NAB tries, again, to negate the competitive marketplace considerations standard. It essentially presses on the Commission the rule "if we demand it, then it must be based on competitive marketplace considerations," based on the vacuous assertion that the broadcasters too have an incentive to reach a deal, and the argument that the market is competitive. Absurdly, the broadcasters try to prove that point by arguing that the market power of cable operators has been lessened by competition from satellite carriers. Ironically, if that were true, it would mean only that the networks now have even *more* bargaining power than before. Regardless of whether the market power of cable operators has lessened (EchoStar believes it has not), the networks' power can only increase with the ability to "whipsaw" one distributor against the other.

In aid of its task of defining what does and does not constitute competitive marketplace considerations, the Commission should indeed look to the retransmission marketplace, where the cable operators have received retransmission consent in exchange for minimal consideration and without making any cash payment, consistent with the Copyright Office's determination that competitive marketplace considerations point to a zero market value for local-into-local retransmissions. Moreover, several factors support the view that, in a competitive marketplace, broadcasters should on balance be willing to grant their retransmission consent to satellite distributors on even better terms than those enjoyed by cable operators.⁴ In

⁴ The broadcasters try to bolster their demand for onerous terms by arguing that EchoStar and DIRECTV charge consumers for local signals. That fact is not probative of the value of retransmission consent for several reasons. *First*, most of the consumers subscribing to local signals are generally presumed under existing Grade B standards to receive these signals

(Continued ...)

light of these facts, any attempt by broadcasters to extract more onerous terms than the norm established in myriad retransmission deals with cable operators should be viewed as presumptively not based on competitive marketplace considerations. Also, attempts at extracting value by tying retransmission to carriage of other broadcast signals (including digital signals) should be regarded as *per se* violations of the good faith obligation.

The NAB also exhibits the broadcasters' inclination to disregard the good faith mandate if left unguided by the Commission when it tries to stake out the broadcasters' ability to deny EchoStar *local-into-local* retransmission consent on the ground that EchoStar and the broadcasters are currently involved in copyright litigation over the retransmission of distant signals. The Commission should leave no doubt at all that such behavior would be a blatant refusal to deal that trumps the congressional directive and violates the core of the prohibitions on bad faith and exclusive dealing.

Such a denial of consent is not consistent with good faith negotiations for several reasons: *first*, it ties the question of local-into-local retransmission to distant signal retransmissions in a way not intended by Congress. Congress – which was fully aware of the litigation between EchoStar and the broadcasters pending in Miami – has prescribed carefully

off the air. The only reason why these consumers purchase a satellite carrier's local signal offering is for value that the satellite carrier creates – far better signal quality, no need for an off-air antenna. There is no basis for the broadcaster to receive any part of that value. Moreover, *second*, consumers within a local Designated Market Area ("DMA") are already counted for purposes of determining the audience that a local broadcaster can deliver to advertisers and the compensation to be received by the broadcaster – one of the reasons why the Copyright Office has concluded that the market value of local-into-local retransmissions is zero. *Third*, the cable systems' charges for "lifeline" cable (essentially the broadcast channels) are higher (\$10 dollars or more), even as cable operators throughout the country have received retransmission consent for no cash payment and at very little cost.

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defined forms of redress for retransmissions that violate the "unserved household" limitation of Section 119's distant signal license. Self-help by the broadcasters through a denial of local-into-local retransmission consent is not one of these types of redress. The broadcasters should not be allowed to take the law in their hands and, in the process, negate the congressional intent to at last allow local-into-local retransmissions. *Second*, courts have frequently found instances of bad faith in exactly such behavior – attempts to walk out of a deal based on a pending dispute. *Third*, the Commission should perform its statutory duty as the courts perform their respective duties, and there is no basis in the statute for allowing the Commission to stay its hand in carrying out its obligations. In that respect, the Cable Services Bureau's decision in *Speedvision* would be inapposite even if it were correct.⁵ *Fourth*, there is no economic justification for the broadcasters to deny local-into-local retransmission based on their allegation that a satellite carrier has violated the limitations of the distant signal copyright license. If anything, local-into-local retransmissions lessen a consumer's interest in receiving distant network signals. Indeed, for years, the broadcasters have been arguing that, instead of revising the antiquated standard for defining which households are eligible to receive distant retransmission and increasing the number of eligible households, Congress should allow local-into-local retransmissions. For broadcasters to now deny their consent to local-into-local retransmissions based on their

⁵ That case would be more comparable if there were a retransmission consent agreement between a broadcaster and a satellite carrier, and the broadcaster had filed a breach of contract action alleging violations of that contract while the satellite carrier had filed a retransmission complaint with the FCC. Even if that were the case, the Commission should resist any attempt by a broadcaster to stall its determinations by inventing a contractual dispute, and the Bureau's decision in *Speedvision* was significantly flawed in that respect. In any event, the broadcasters cannot cite *Speedvision* in the present fundamentally different circumstances as a vehicle for using any federal court litigation to delay the Commission's adjudication of their conduct in the area of local-into-local retransmissions.

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Exhibit D

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purported concerns with distant retransmissions would turn that prior position on its head and would be an example of disparity in treatment that is not based on competitive marketplace considerations.